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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

11 ANTOLIN ANDREW MARKS,

12 Plaintiff,

13 v.

14 TOM GILES, SDO RUXHALL, and JACK
15 BENNETT,

16 Defendants.
17

Case No. C07-5572RJB

ORDER ADOPTING REPORT
AND RECOMMENDATION

18 This matter comes before the Court on the Report and Recommendation of U. S. Magistrate Judge
19 J. Kelley Arnold. Dkt. 26. The Court has considered the Report and Recommendation, objections to the
20 Report and Recommendation, and the record.
21

22 **I. FACTS**

23 Plaintiff filed this 42 U.S.C. 1983/Bivens action on October 17, 2007. Dkt. 1. Plaintiff is
24 incarcerated at the Northwest Detention Center (“NDC”) and is going through the process of being
25 deported. *Id.* Plaintiff named employees of GEO, a contractor at the NDC, and federal employees as
26 defendants. *Id.* Defendants Alisha Singleton, Charles McBurney, and George Wigen (employees of GEO)
27 were dismissed by stipulation on January 9, 2008. Dkt. 12. The remaining Defendants are federal
28 employees Tom Giles, SDO Ruxhall, and Jack Bennett.

1 The Report and Recommendation reviews the facts leading up to this case, and so, shall not be
2 repeated here. The Report and Recommendation recommends that all claims be summarily dismissed
3 except Plaintiff's claim for unconstitutional conditions of confinement. *Id.* Plaintiff filed objections to the
4 Report and Recommendation. Dkt. 27. He argues that his use of profanity was constitutionally protected
5 speech. *Id.* He argues that being charged with four separate offenses based on one incident was a
6 violation of his double jeopardy rights. *Id.* Plaintiff contends that his Due Process rights were violated at
7 the hearing because he was not given an opportunity to confront witnesses. *Id.*, at 15. Plaintiff contends
8 that he was given excessive punishment for his offense. *Id.* He argues that as a result of his behavior,
9 Defendants retaliated against him. *Id.*

10 The Report and Recommendation (Dkt. 52) should be adopted. Plaintiff has failed to carry his
11 burden under Fed. R. Civ. P. 56 to avoid the summary dismissal, with prejudice, of his claims for a
12 violation of his free speech rights, double jeopardy rights, excessive punishment rights and claim for
13 retaliation. The Report and Recommendation should be adopted as to Plaintiff's Due Process claim, and
14 the case may proceed on that claim.

15 II. DISCUSSION

16 A. FREE SPEECH CLAIM

17 Plaintiff's argument, that his use of profanity while in a conflict with a staff member at NDC was
18 protected speech, and that punishment for his use of profanity was a violation of his First Amendment
19 rights, is without merit. "[T]he constitutional rights that prisoners possess are more limited in scope than
20 the constitutional rights held by individuals in society at large. In the First Amendment context, for
21 instance, some rights are simply inconsistent with the status of a prisoner or with the legitimate penological
22 objectives of the corrections system." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (*citing Pell v.*
23 *Procunier*, 417 U.S. 817, 822 (1974)). Plaintiff claims that,

24 Plaintiff had a right to say "you don't know what the fuck you're [sic] talking about." Only
25 white people are so controlled in their speech, and not all of them. The Magistrate failed to
26 recognize the fact that the Plaintiff is a Black individual who lives in a Black world where
profanity is used 100% of the time and is the usual rather than the unusual. The magistrate
was wrong to impose his puritan views upon the Plaintiff.

27 Dkt. 27, at 8. Despite his assertions, Plaintiff has not shown that his use of profanity in the dorm room
28 while standing under the TV at the NDC was protected speech.

1 Even assuming that it was protected speech, “[w]hen a prison regulation impinges on inmates’
2 constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”
3 *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under *Turner*, four factors are to be balanced in determining
4 whether a prison regulation is reasonably related to legitimate penological interests:

5 (1) Whether there is a valid, rational connection’ between the prison regulation and the
6 legitimate governmental interest put forward to justify it; (2) Whether there are alternative
7 means of exercising the right that remain open to prison inmates; (3) Whether
8 accommodation of the asserted constitutional right will impact guards and other inmates,
and on the allocation of prison resources generally; and (4) Whether there is an absence of
ready alternatives versus the existence of obvious, easy alternatives.

9 *Shakurv. Schriro*, 514 F.3d 878, 884 (9th Cir. 2008)(*internal citations omitted*).

10 As to the first factor, there is a valid, rational connection between restricting the use of profanity
11 and the asserted governmental interest - security at the NDC. In his own pleading, Plaintiff acknowledges
12 that the “Defendants have an interest in the orderly operation of the center.” Dkt. 27, at 11. He provides
13 no rational basis to conclude that limiting the use of profanity is not connected to the orderly operation of
14 the NDC. Defendants state that in an effort to de-escalate the situation, Officer Giles had to exit the unit
15 to allow Plaintiff and other detainees to calm down. Dkt. 14-2, at 1. A sufficient showing has been made
16 as to the first factor. As to the second factor, whether there are alternative means of exercising the right
17 that remain open to inmates, here, the regulation merely restricts the use of profanity. There is no
18 indication that other less volatile terms of personal expression are so limited. Turning to the third factor,
19 accommodation of Plaintiff’s asserted constitutional right would impermissibly impact guards and other
20 inmates. Lastly, there appears to be an absence of ready alternatives. The challenged regulation here is
21 reasonably related to legitimate penological interests. Plaintiff’s First Amendment claim should be
22 dismissed.

23 **B. DOUBLE JEOPARDY CLAIM**

24 Plaintiff also fails to point to any evidence or authority to conclude that his double jeopardy rights
25 were violated. He simply repeats his earlier arguments, which are without merit. This claim should be
26 dismissed.

27 **C. PROCEDURAL DUE PROCESS**

28 To the extent Plaintiff now makes a Procedural Due Process claim, Plaintiff disputes the Report and
Recommendation’s finding that his claim is barred because he raised the same claim in his habeas corpus

1 petition. There his claim was dismissed because it did not challenge the fact or duration of his
2 confinement. *Marks v. Clark*, 07-CV-5498RJB. Plaintiff now brings his claim pursuant section 1983. In
3 the interest of fairness, the Court has considered this claim, and holds that it should be dismissed.

4 As a person detained for deportation, Plaintiff's due process rights are treated as the equivalent of a
5 pretrial detainee's rights. *See Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000). "Pretrial detainees
6 may be subjected to disciplinary segregation only with a due process hearing to determine whether they
7 have in fact violated any rule." *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996). "The elements of
8 due process in a prison disciplinary hearing have long been established by *Wolff v. McDonnell*, 418 U.S.
9 539, 94 (1974). *Id.*, at 525. "*Wolff* requires that jail authorities allow an inmate who faces disciplinary
10 proceedings and whose liberty interest is threatened to call witnesses in his defense, when permitting him to
11 do so will not be unduly hazardous to institutional safety and correctional concerns." *Id.*

12 Plaintiff here alleges that he was permitted to call witnesses, but that he was not able to confront
13 them. Dkt. 27, at 15. Plaintiff fails to cite any authority that his due process rights require that he be able
14 to confront witnesses at a disciplinary hearing. In fact, the Supreme Court noted that, an entirely different
15 balancing of concerns applies to confrontation and cross-examination of those witnesses: greater likelihood
16 of hostility and resentment between the accused and the witness, which would erode discipline and threaten
17 corrective aims; lengthening of the proceedings; and a lesser due process interest for the inmate in
18 confronting these witnesses than in calling his own to provide exculpatory evidence. *Baxter v.*
19 *Palmigiano*, 425 U.S. 308, 322 (1976). Accordingly, Due process does not require Plaintiff be able
20 confront witnesses at disciplinary hearings. *Id.* Plaintiff also argues that he should have been given a copy
21 of the investigation report that the GEO Defendants prepared. Plaintiff fails to cite any authority for his
22 contention that he would be entitled under the Due Process to a copy of the institution's investigative
23 report. Moreover, Plaintiff does not deny that he had notice of the hearing and an opportunity to be heard.
24 He, in fact, plead guilty to two of the violations charged. Dkt. 14-2, at 4.

25 Additionally, to the extent that Plaintiff makes his procedural due process claim against Defendants
26 Giles and Bennett, he has failed to show that they personally participated in the hearing. "A person
27 deprives another of a constitutional right, where that person does an affirmative act, participates in
28 another's affirmative acts, or omits to perform an act which that person is legally required to do that causes

1 the deprivation of which complaint is made.” *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007) (*citing*
2 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). The “requisite causal connection can be established
3 not only by some kind of direct personal participation in the deprivation, but also by setting in motion a
4 series of acts by others which the actor knows or reasonably should know would cause others to inflict the
5 constitutional injury.” *Id.* Plaintiff’s procedural due process claim against Defendants Giles and Bennett
6 should be dismissed for failure to allege personal participation.

7 **D. EXCESSIVE PUNISHMENT CLAIM**

8 As to his claim for excessive punishment, he reasserts that 66 days in segregation is too long for the
9 event which occurred. Dkt. 27. Plaintiff’s arguments are again without merit. Additionally, Plaintiff has
10 failed to show that Defendants Giles and Bennett personally participated in the decision to send him to
11 segregation. Plaintiff’s excessive punishment claim should be dismissed.

12 **E. RETALIATION**

13 Plaintiff has failed to carry his burden as to his retaliation claim. He only repeats his prior
14 arguments. His claim should be dismissed.

15 **F. CONCLUSION**

16 The Report and Recommendation should be adopted, and Plaintiff’s free speech, double jeopardy,
17 procedural due process, excessive punishment and retaliation claims should be dismissed. The Report and
18 Recommendation recommends allowing the matter to proceed on Plaintiff’s claim regarding the conditions
19 of the segregation unit. The case should be re-referred to Judge Arnold for further proceedings. The
20 denial of the summary judgment motion on the conditions of confinement claim should be without
21 prejudice pending further discovery.

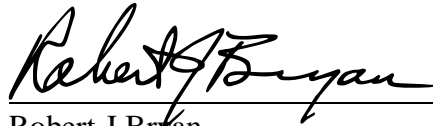
22 **III. ORDER**

23 Accordingly, it is hereby **ORDERED**:

- 24 • The Report and Recommendation (Dkt. 26) is **ADOPTED**;
- 25 • Plaintiff’s free speech, double jeopardy, procedural due process, excessive punishment and
26 retaliation claims **ARE DISMISSED**;
- 27 • The case is **RE-REFERRED** to Judge Arnold; and
- 28 • The Clerk is directed to send copies of this Order to Plaintiff, all counsel of record, and to the Hon.

1 J. Kelley Arnold.

2 DATED this 24th day of September, 2008.

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5 Robert J Bryan
6 United States District Judge
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